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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH BRUNO-MARTINEZ, Defendant and Appellant.	C060660 (Super. Ct. No. 07F08138)

Defendant was convicted by a jury of attempted murder (Pen. Code, § 664/187; further undesignated section references are to the Penal Code) and shooting at an occupied vehicle (§ 246), and was found to have committed both offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and to have used a firearm in connection with the attempted murder (§ 12022.53, subd. (c)). He was sentenced to a determinate term of 27 years for the attempted murder and firearm enhancement and a consecutive term of 15 years to life for shooting at an occupied vehicle.

Defendant appeals, claiming instructional error, jury tampering, insufficiency of the evidence on the gang enhancement, and a violation of section 654. We affirm the judgment.

FACTS AND PROCEEDINGS

On the evening of August 4, 2007, Roland R., Edgar E., Marco C., and Carmen M. attended a birthday party at a restaurant in Rancho Cordova. They arrived around 10:00 p.m. in Carmen's vehicle. At approximately 1:30 a.m., they began to depart. However, as Roland stepped outside the front door, he was approached from behind by defendant. Defendant said something about the tattoo on Roland's arm, which read "M.O.B.," and asked Roland where he was from. Defendant was wearing a red shirt and red khaki shorts, and there were six or seven others with him.

Roland interpreted defendant's question as a reference to gang affiliation and responded that he was not a gang member. However, defendant did not accept this denial and "started cussing at Roland" and said something about "Fruitridge." Roland said he did not want any trouble and began moving toward Carmen's vehicle. Meanwhile, defendant pulled a handgun out from under his shirt.

Roland and the others reached Carmen's vehicle and got inside. However, they could not get it started. At the same time, defendant shot once into the air and then began shooting at the vehicle. Roland and the others climbed out and ran.

In all, at least seven shots were fired, five from a .40 caliber gun and two from a .45 caliber gun. Carmen's vehicle was hit multiple times and one of the windows was shattered. None of Roland's group was hit by the shots.

Roland and the others were later shown a photographic lineup and they all selected defendant. They were also shown a photograph of defendant taken earlier that evening inside the restaurant and identified him as the shooter.

Defendant was charged with attempted murder of Roland R., with enhancements for personal use of a firearm and commission of the offense for the benefit of a criminal street gang. He was also charged with discharging a firearm at an occupied vehicle, also with a gang enhancement.

At trial, none of the four in Roland's group was able to identify defendant in the courtroom as the shooter. Carmen testified she did not remember much about what happened and could not recall who was doing the shooting. Detective Jason Ramos, a gang expert, testified that defendant is a validated member of the Nortenos criminal street gang and that this was "absolutely" a gang shooting. Ramos relied on the following factors: defendant was wearing red at the time, he was in the company of another who was wearing red and sporting a Mongolian haircut, defendant said something about "Fruitridge" at the time of the incident, gang members typically verbalize the area they are from before committing crimes, defendant confronted an individual about a tattoo on his arm and asked where he was

from, and such question is a common precipitator of gang violence.

Defendant was found guilty on both charges and all enhancements were found true. He was sentenced on the attempted murder charge to a determinate middle term of seven years, plus 20 years for the weapon enhancement. On the charge of shooting at an occupied vehicle, defendant received a consecutive, indeterminate term of 15 years to life by virtue of the gang enhancement (see § 186.22, subd. (b)(4)(B)).

DISCUSSION

I

Kill Zone Instruction

Defendant was charged with the attempted murder of Roland R. During a discussion of jury instructions outside the presence of the jury, the court indicated it would be giving CALCRIM No. 600 on the elements of attempted murder without an optional paragraph relating to a kill zone theory. The parties acquiesced, with the prosecutor indicating he was not pursuing such a theory and defense counsel indicating he had not proceeded against such a theory. The jury was instructed as follows:

"The defendant is charged in Count 1 with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that:

"1. The defendant took direct but ineffective steps toward killing another person; and

"2. The defendant intended to kill that person.

"A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the end plan."

During deliberations, the jury sent out the following question: "On Count 1 do we have discretion to find guilty of attempted murder charges without specifying Roland [R.]?" After discussion with counsel, the court gave the following response: "No. The victim alleged in the charge is 'Roland [R.]' However, you may consider the following instruction of law as a supplement to Instruction 600." The court then read the following modified version of the optional kill zone paragraph in CALCRIM No. 600:

"A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Roland [R.], the People must prove that the defendant not only intended to kill anyone in Carmen [M.]'s car but also either intended to kill Roland [R.], or intended to kill anyone within the kill zone. If you have a reasonable

doubt whether the defendant intended to kill Roland [R.] by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Roland [R.]"

Defendant contends the foregoing instruction was inappropriate under the facts of this case, because he was charged with a single count of attempted murder of a specific victim. Defendant further argues the instruction as given was seriously flawed, by suggesting that he could be found guilty of attempted murder of Roland R. if he intended to kill *anyone* in the car, thereby authorizing the jury to apply a transferred intent theory. In effect, defendant argues, the instruction eliminated the specific intent requirement of attempted murder. Defendant further argues the instruction was flawed in that it used the word "harming" in the final sentence rather than "killing." Defendant argues these flaws increased the likelihood the jury convicted him without finding he intended to kill Roland R.

In *People v. Bland* (2002) 28 Cal.4th 313, the California Supreme Court rejected use of a transferred intent theory in a prosecution for attempted murder. The court explained that while intent to kill a specific victim may transfer to other victims who are in fact killed, "this rationale does not apply to persons not killed." (*Id.* at p. 327.) According to the court, "[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." (*Ibid.*) The court explained: "The world contains many people a murderous

assailant does not intend to kill. Obviously, intent to kill one person cannot transfer to the entire world. But how can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent theory?" (*Id.* at p. 329.)

Nevertheless, the court recognized that while transferred intent is not appropriate for attempted murder, a defendant who shoots into a group of people within a "kill zone" may be held liable for attempting to kill all of them on a concurrent intent theory. (*People v. Bland*, *supra*, 28 Cal.4th at p. 329.) "'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Ibid.*)

California courts have applied this concurrent intent and kill zone theory where the defendant fired a weapon into a vehicle carrying multiple passengers (see *People v. Campos* (2007) 156 Cal.App.4th 1228, 1233, 1244), where the defendant set arson fires at both entrances to a victim's home without knowing others were present (see *People v. Adams* (2008) 169 Cal.App.4th 1009, 1013-1014, 1020-1023), and where the defendant fired multiple shots at a group of people standing in front of a market (see *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391, 1393-1397).

In *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*), the defendant was charged with and convicted of a single count of attempted murder of a specific victim after he fired a single

shot at a group of 10 people, including the named victim. (*Id.* at p. 135.) The trial court gave the following kill zone instruction: "'A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or . . . "kill zone" . . . . [¶] In order to convict the defendant of the attempted murder of [Joel F.], the People must prove either that the defendant intended to kill [Joel F.], or that he not only intended to kill another human being, but also that he intended to kill anyone within the "kill zone," and that [Joel F.] was in the zone of harm or "kill zone" at the time of the shot. [¶] If you have a reasonable doubt whether the defendant intended to kill [Joel F.] or intended to kill another by harming everyone in the "kill zone," or whether [Joel F.] was in the "kill zone" then you must find the defendant not guilty of the attempted murder of [Joel F.].'" (*Id.* at p. 138.)

The high court concluded the trial court erred in giving the foregoing instruction under the circumstances presented. According to the court: "The kill zone theory simply does not fit the charge or facts of this case. That theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons. Here, defendant was charged with but a single count of attempted murder. He was not charged with 10 attempted murders, one for each member of the group at which he shot. As the Court of Appeal explained, 'There was no evidence here that [defendant]

used a means to kill the named victim, Joel F., that inevitably would result in the death of other victims within a zone of danger. [Defendant] was charged only with the attempted murder of Joel F. and not with the attempted murder of others in the group on which [defendant] fired his gun.'" (*Stone*, *supra*, 46 Cal.4th at p. 138.)

However, the high court went on to explain that a person who intends to kill may be found guilty of attempted murder even if he does not have a particular victim in mind. (*Stone*, *supra*, 46 Cal.4th at p. 140.) But, in *Stone*, the defendant was charged with attempting to kill a specific victim. According to the court: "This allegation was problematic given that the prosecution ultimately could not prove that defendant targeted a specific person rather than simply someone within the group. In hindsight, it would no doubt have been better had the case been charged differently. In a case like this, the information does not necessarily have to name a specific victim." (*Id.* at p. 141.)

The present matter is similar to *Stone*. Here, defendant was charged with a single count of attempted murder of a specific victim based on shots fired at a group of four people. However, unlike *Stone*, the present matter involved at least six shots fired at a group of four people in a car under circumstances whereby a reasonable jury could conclude defendant intended to kill all of them, including the named victim. That makes all the difference. The kill zone instruction does not eliminate the requirement of specific intent to kill the named

victim, as defendant argues. Rather, it gives the jury two options for finding intent to kill. Either defendant intended to kill Roland R., or he intended to kill all four people in a group that included Roland R. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 393.)

Defendant suggests the instruction nevertheless permitted the jury to convict him of the attempted murder of Roland R. on a transferred intent theory. He relies specifically on the repeated use of the word "anyone" in the instruction. As quoted above, the instruction given by the court read: "A person may intend to kill a specific victim or victims and at the same time intend to kill *anyone* in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Roland [R.], the People must prove that the defendant not only intended to kill *anyone* in Carmen [M.]'s car but also either intended to kill Roland [R.], or intended to kill *anyone* within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Roland [R.] by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Roland [R.]" (Italics added.)

In *Stone*, the high court indicated the word "anyone" in the standard jury instruction on the kill zone theory should be replaced with "everyone." (*Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.) However, the court also noted that, "[i]n context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in

the kill zone." (*Ibid.*) The last sentence of the instruction refers to a reasonable doubt whether the defendant intended to kill Roland R. by harming *everyone* in the kill zone.

In evaluating a claim the jury could have misconstrued an instruction, the test on review is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Raley* (1992) 2 Cal.4th 870, 901, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 [116 L.Ed.2d 385, 399].) In this instance, we find no reasonable likelihood the jury would have read the instruction as a whole to mean it could find defendant guilty of attempted murder of Roland R. if it concluded defendant intended to kill one of the others in the car rather than everyone in the car.

Defendant also contends the last sentence of the instruction erroneously used the word "harm" rather than "kill." In *Stone*, the high court also noted that, "[b]ecause the intent required for attempted murder is the intent to kill rather than merely harm, it would be better for the instruction to use the word 'kill' consistently rather than the word 'harm.'" (*Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.) Here again, however, as we explained in *People v. Bragg*, *supra*, 161 Cal.App.4th at page 1396: "No reasonable juror could have failed to understand from the instructions as a whole that, to the extent the court occasionally used the word 'harm' or the phrase 'zone of harm,' the harm to which the court referred was the ultimate harm of

death and that the law required that defendant had to have intended to kill the victims."

II

Jury Tampering

On the evening of the shooting, Carmen M. told investigators that when the shots were fired, she looked up and saw the shooter. She described him and said she was certain she could identify him. Later, Carmen selected defendant's picture from a photographic lineup and identified defendant as the shooter from a photograph taken that evening. Carmen indicated at the time that the argument began over Roland's tattoo, she tried to step between the two men, but defendant pushed her away. She further indicated defendant started shooting at the car.

However, when called to testify at trial, Carmen claimed she could not remember who had shot at them. She claimed to have memory problems. In fact, she claimed not to be able to remember a discussion she had with a deputy district attorney and an investigator earlier that day.

An investigator for the district attorney's office later testified that, on the day of her testimony, Carmen told him she was sitting in the hallway outside the courtroom and defendant's mother was also present and may have taken her picture with a cell phone. Carmen also indicated two women showed up at court that day and one of them knew her and would be able to identify her. Carmen indicated she was frightened to testify and would

therefore claim in court that she did not remember anything. Carmen confirmed the foregoing in court. Although she indicated she did not know if a photograph had been taken of her, she admitted telling the investigator she did not know why else the woman would walk past her with her cell phone open except to take her picture. Carmen further acknowledged that, prior to this event, she had never expressed to the prosecutor or his investigator that she did not remember the events surrounding the shooting.

Later that same day, after the People rested, the court conducted an interview with juror No. 1 out of the presence of the other jurors. The court explained it had received information that the juror expressed concerns about being photographed. The following discussion ensued:

"JUROR NUMBER ONE: My concern was general. The individuals who I believe had been identified as having possibly taken a picture of the one witness were out in the hallway with their cameras.

"There's actually three individuals with cameras--not with cameras--with telephones which possibly could have cameras on them. I have no personal knowledge. However, they were holding them out and moving them around.

"The entire jury was right in the area where they were doing this. I looked at it and I thought it was a little strange, and I thought I should bring it to the bailiff's attention. I have no specific knowledge of anything.

"THE COURT: Do you have any concern yourself that might affect your ability to be a fair juror at this point as a result of making those observations in the hallway?

"JUROR NUMBER ONE: No. If I was majorly [*sic*] concerned and wanted to be excused, I would have told the bailiff.

"THE COURT: Okay. I can tell you that the bailiff has spoken to the individuals in question. At this point there is no concrete evidence that any photos were taken or tried to be taken, but we will monitor the situation.

"We just want to make sure that any concerns that might be raised apropos to the testimony we heard in this case are being addressed, and I wanted to find out specifically if your ability to be a fair juror has been affected in any way.

"As I understand it, you are saying no?

"JUROR NUMBER ONE: No.

"THE COURT: Okay. Thank you very much.

"JUROR NUMBER ONE: Solely on the evidence.

"THE COURT: See you on Monday.

"MR. HIGHTOWER [the prosecutor]: If we can ask for follow-up about discussion with other jurors.

"THE COURT: Let me ask you that, sir: Have you discussed the same sort of concerns that you raised with the bailiff with other jurors?

"JUROR NUMBER ONE: Have I discussed it? No, I have not.

"THE COURT: All right. Thank you.

"MR. LIPPSMEYER [defense counsel]: And--

"THE COURT: I have to ask all the questions. You are not allowed to ask direct questions.

"MR. LIPPSMEYER: I want to know if there has been other discussions or--

"THE COURT: "Has anyone else discussed the matter with you, or did you overhear any discussion from other jurors apropos of that subject?"

"JUROR NUMBER ONE: No. What made me notice it, I pulled my notes out of my book and looked up, was the fact that two of the young lady jurors--and I wouldn't even be sure of which two, possibly one, were standing close by and they were looking at these people.

"They showed a little concern on their faces, which is kind of what made me look up and then look at what was going on. Then I thought, well, I will say something.

"THE COURT: Okay. Thanks for the information. Thank you.

"JUROR NUMBER ONE: Sure. Have a good weekend.

"THE COURT: All right."

After the juror departed, the court questioned the bailiff. The bailiff indicated he spoke to defendant's mother, and she said "she was walking down the hall talking on one [cell phone] and texting with the other and that she didn't take any photos." Defense counsel added that he examined the cell phones and found they were not camera phones.

Defendant contends the trial court failed to make a sufficient inquiry about the incident. He argues the court should have questioned all the jurors, not just Juror No. 1.

The People respond that defendant's argument is based on speculation that other jurors were impacted by the incident and, in any event, defendant forfeited the issue by failing to request that the other jurors be questioned.

We agree the issue is forfeited. Defendant never requested that the court question the other jurors after hearing from Juror No. 1. After excusing Juror No. 1, the court asked both counsel if there was anything they wanted to state for the record. Both counsel answered no. Defense counsel then said: "I am terribly--for the record I don't know that I am terribly satisfied with that, but the purpose of the 136 questions and nobody has ever been killed in Sacramento County, if there was as much as anything to rest assurances, but I do think it can be a real problem. [¶] He [Juror No. 1] didn't seem to show any fear but I am concerned that other people are concerned. I don't know if it would do any good to call mom and bring her cell phone. She had two. She had her mother's and she was texting on one and whatever." The court declined to bring in defendant's mother to question her about the cell phone incident.

Nowhere in the foregoing did defense counsel request any further inquiry of the jurors. It is one thing to be concerned about the situation and another to propose that the court do something more about it. In *People v. Holloway* (2004) 33 Cal.4th 96, at pages 126-127, the California Supreme Court concluded the defendant forfeited a claim that the trial court failed to make a more thorough inquiry of a particular juror

regarding bias by failing to seek a broader inquiry of the juror at the time or otherwise object to the trial court's course of action. Defendant contends *Holloway* is distinguishable in that it involved one juror whom the court did question whereas here the argument is that the court failed to conduct any inquiry whatsoever as to the other 11 jurors. However, this is a distinction without a difference. The question is whether the court was required to do more than it did. By failing to request that the court do more, the issue is forfeited.

At any rate, any presumption of prejudice from the conduct in question was clearly rebutted. Defendant argues the trial court made a factual finding that the incident in question created apprehension among the jurors, and we must defer to this factual finding. However, the court made no such finding. Defendant is referring to a comment by the court after defense counsel offered to tell defendant's mother not to text while in court. The court responded: "If you have enough of a relationship with her to be able to say so, you might tell her that her activities with the phone are creating apprehension to some extent and she ought to just keep it in her purse and keep it off." This is not a finding that the activities of defendant's mother were in fact causing apprehension. The court merely suggested that defense counsel tell her so in order to get her to stop.

The Sixth Amendment gives a defendant the right to a trial by an impartial jury. (U.S. Const., Amend. VI; see U.S. Const., Amend XIV & Cal. Const., art. I, § 16.) "'In a criminal case,

any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . .' [Citation.]" (*Remmer v. United States* (1956) 350 U.S. 377, 379 [100 L.Ed. 435].)

"Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.] [¶] The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]. It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

Defendant appears to base his claim of prejudice on whether and to what extent any of the jurors may have been intimidated

by the improper conduct of defendant's mother. However, this line of attack is misguided. To the extent the jurors were intimidated, this could only inure to defendant's benefit by coercing those jurors into deciding in his favor to avoid future threat. This matter must be distinguished from those cases where juror's may have been intimidated by outbursts from relatives of the *victim*. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 369; *People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) In the latter cases, the jurors might have been intimidated to decide against the defendant to appease the victim's relatives.

Defendant's real concern here is not that certain jurors were intimidated but that certain jurors were *not* intimidated but were instead angered by the conduct and took that anger out on defendant. But here, there is nothing in the information provided to the court by Juror No. 1 to suggest he or the other jurors might have been angered by the incident or might hold what had occurred against defendant. A juror's concern for safety from a defendant's relatives or supporters does not necessarily translate into bias against the defendant. (See *People v. Panah* (2005) 35 Cal.4th 395, 480.) Here, the trial court satisfied itself that defendant would not be prejudiced by the alleged conduct. Nothing more was required.

Defendant contends the court was required to question the other jurors under section 1120. It reads: "If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If,

during the retirement of the jury, a juror declare [*sic*] a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his discharge as a juror."

It is readily clear section 1120 has no application to the present matter. There is no suggestion any of the jurors had knowledge of any facts at issue in this prosecution. Their knowledge, if any, related to a peripheral matter concerning alleged jury tampering unrelated to the facts of the case. Defendant was not charged with jury tampering.

III

Sufficiency of the Evidence--Gang Enhancement

Defendant contends the evidence is insufficient to support the gang enhancements. In particular, he argues that, while there was evidence regarding a variety of gangs, the People presented no evidence of collaborative activities among them, which would be necessary to aggregate their activities for purposes of satisfying the gang enhancement requirement. Defendant further argues that, even considering the activities of the individual gangs combined, there was insufficient evidence of the various elements necessary for a gang enhancement.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We review the whole record, not isolated bits of evidence, to determine if it supports the judgment below. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*Id.* at p. 576, quoting from *People v. Reilly* (1970) 3 Cal.3d 421, 425.)

Substantial evidence is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652.) Expert opinion testimony constitutes substantial evidence only if based on conclusions or assumptions supported by evidence in the record. (*Id.* at p. 651.) "Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation.]" (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

Section 186.22 provides for enhanced punishment in the event a felony is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), [of section 186.22,] having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal activity." (§ 186.22, subd. (f).) The enumerated offenses include robbery (186.22, subd. (e)(2)), unlawful homicide or manslaughter (§ 186.22, subd. (e)(3)), "sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances" (§ 186.22, subd. (e)(4)), shooting at an occupied vehicle (§ 186.22, subd. (e)(5)), burglary (§ 186.22, subd. (e)(11)), carjacking (§ 186.22, subd. (e)(21)), and "[p]ossession of a pistol, revolver, or other firearm capable of being concealed upon the person" (§ 186.22, subd. (e)(23)). Within the meaning of section 186.22, "'pattern of criminal activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of" the enumerated offenses, provided "the last

of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

In order to impose an enhancement under section 186.22, it is first necessary to identify the gang for whom the offense was committed. In *People v. Williams* (2008) 167 Cal.App.4th 983, the defendant was convicted of murder and active participation in a criminal street gang named the "Small Town Peckerwoods," which was alleged to be part of a larger "Peckerwoods" gang. On appeal, the defendant argued, among other things, there was insufficient evidence to support the gang charge. In particular, the defendant argued the relevant group to consider was the local gang, the Small Town Peckerwoods, not the larger group, and there was insufficient evidence regarding the activities of the smaller group to support the conviction. (*Id.* at pp. 985, 987.)

The Court of Appeal agreed and reversed the gang conviction. In the context of "the relationship that must exist before a smaller group can be considered part of a larger group for purposes of determining whether the smaller group constitutes a criminal street gang" (*People v. Williams*, *supra*, 167 Cal.App.4th at p. 985), the court said: "[S]omething more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be

inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization." (*Id.* at p. 988.) The court concluded no such showing had been made in that case. (*Ibid.*)

Defendant suggests there was no evidence presented here of collaborative activities or a collective organizational structure among the various subsets of the Nortenos criminal street gang, including the Fruitridge Vista Nortenos. Hence, he argues, activities by one subset could not be used to prove the elements required for a gang enhancement involving another subset.

This is a red herring. The People did not attempt to prove defendant committed the offenses for the benefit of the Fruitridge Vista Nortenos by presenting evidence of the activities of other Nortenos subsets. Detective Ramos, the prosecution's gang expert, testified that the Nortenos are a criminal street gang with approximately 3,000 members in Sacramento County. He also identified the Fruitridge Vista Nortenos as a subset of the larger group with two to three dozen members in a particular geographic location. Detective Ramos testified defendant has been a validated member of the Nortenos since 2001 and continues to be a member. He did not indicate whether defendant was a member of the Fruitridge subset and did not know whether the Fruitridge subset had its own constitution or bylaws or used its own gang signs.

In *People v. Ortega* (2006) 145 Cal.App.4th 1344, we rejected the defendant's argument that the prosecution was

required to prove which subset of the Nortenos was involved in the case. We explained that evidence had been presented through the prosecution's gang expert "to establish every element of the existence of the Nortenos as a criminal street gang" (*id.* at p. 1356) and "[n]o evidence indicated the goals and activities of a particular subset were not shared by the others" (*id.* at p. 1357). Although defendant's gang expert, Mark Harrison, testified the Nortenos is not necessarily a gang itself but is a "movement in which individuals click up and have their unique gang identity based on that," he later acknowledged the Nortenos is a criminal street gang with three or more members, having common signs or symbols, who have primary activities that are criminal in nature, although different subsets may have different primary activities.

Defendant next argues that even if it is proper to consider the Nortenos as a whole, some of the offenses used by the prosecution to establish the elements of the gang enhancement are not qualifying offenses under section 186.22 and the expert opinion that other offenses are primary activities of the gang "was not supported by proper *facts and reasons*." Defendant points to Detective Ramos's opinion that possession of controlled substances for sale is a primary Norteno activity is not supported by the facts, in that Detective Ramos described an arrest for simple possession rather than possession for sale. Simple possession of a controlled substance is not a listed offense under the gang statute. Defendant further asserts Detective Ramos cited homicides as a primary activity but then

referred only to one such homicide. To be a primary activity, something more than the occasional commission of the offense is required. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

Defendant further argues Detective Ramos's opinion that "shootings" and "possession of weapons" are primary activities cannot support his opinion that this was a gang-related shooting, because "shooting" and "possession of weapons" are not listed crimes. He further argues Detective Ramos's opinion that "stolen vehicles," "robbery," and "burglary" are primary activities is not supported by any facts or reasons.

Finally, defendant argues the particular offenses relied upon by Detective Ramos as the predicate crimes, i.e., carrying a concealed weapon, attempted murder, and shooting at an occupied vehicle, will not suffice because Ramos did not identify those offenses as primary activities of the Nortenos.

We are not persuaded. There is no requirement that all the primary activities identified by the gang expert be listed offenses under section 186.22, as long as at least one of them is. The statute defines a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as *one* of its primary activities the commission of *one or more* of the criminal acts enumerated" in the statute. (§ 186.22, subd. (f), italics added.) Here, Detective Ramos identified the primary activities of the Nortenos gang as including homicides, robberies and burglaries. All three of these are enumerated crimes. He indicated his opinion regarding the primary activities of the

Nortenos came from personal contacts with gang members who have been arrested and in some cases convicted of those crimes. He also indicated he has reviewed cases where gang members have been arrested for those offenses, even though he had no personal involvement in those cases. He was then asked to provide some examples. He mentioned a homicide in 2004 and a current homicide prosecution. However, there was no indication these were the only cases of which he was familiar.

Defendant's argument assumes that in order to consider a particular crime as a primary activity of a gang, the prosecution must present specific evidence of numerous such crimes committed by gang members. However, that is not the law. This evidence may be presented in summary fashion, as Detective Ramos did here. If defendant did not believe Detective Ramos had information about a sufficient number of enumerated offenses to back up his conclusion, it was defendant's burden to explore the issue.

Finally, as to defendant's argument that the particular predicate offenses relied upon by Detective Ramos will not suffice because Ramos failed to identify those offenses as primary activities of the Nortenos, this is a nonstarter. There is no requirement that the gang expert rely on predicate offenses that are also primary activities of the gang.

IV

Section 654

Defendant contends imposition of separate sentences for attempted murder and shooting at an occupied vehicle, where both offenses were based on the same shooting incident, violates section 654. Section 654 provides that where an act or omission is punishable in different ways by different provisions of law, it may be punished only under the provision that provides for the longest potential term of imprisonment.

"[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) On the other hand, "if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of criminal conduct is divisible within the meaning of section 654 depends on the intent and objective of the actor. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) This is a question of fact for the trial court. (*Liu*, *supra*, at pp. 1135-1136.)

In the present matter, although the trial court concluded defendant entertained a single objective during an indivisible course of conduct, it concluded defendant may nevertheless receive separate punishments because of the presence of multiple victims.

In *People v. Martin* (2005) 133 Cal.App.4th 776 (*Martin*), the defendant was convicted of corporal injury to a spouse, resisting arrest and battery of a peace officer and was sentenced on all three offenses. (*Id.* at p. 779.) The latter two offenses stemmed from defendant's act of resisting several officers who were trying to arrest him and injuring one of them. (*Id.* at pp. 779-780.) On appeal, the defendant argued section 654 prohibited sentencing on both the resisting and battery offenses, because they were committed during an indivisible course of conduct with a single objective, escape. (*Id.* at p. 780.)

The Court of Appeal disagreed, applying the multiple victim exception to section 654. "[A]s a general rule, even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim. [Citations.] '"[W]hether a crime constitutes an act of violence that qualifies for the multiple-victim exception to section 654 depends upon whether the crime . . . is defined to proscribe an act of violence against the person.'" (*Martin*, *supra*, 133 Cal.App.4th at pp. 781-782.) In that case, the court concluded

both resisting arrest and battery of a peace officer are crimes of violence. (*Id.* at p. 782.)

Defendant contends the multiple victim exception does not apply here, because the present matter involved only one victim, Roland R. He argues the applicability of section 654 "should not be dependent upon the mere *fortuity* of the number of people (uninjured) who might have been near the named victim when the shots are fired." However, that same argument could have been made in *Martin*. There, the defendant received multiple punishments based on the fortuity that there were multiple police officers present when he resisted arrest.

Defendant contends *Martin* is nevertheless distinguishable, because in *Martin* all four officers were struck by the defendant. However, we find nothing in *Martin* to confirm that assertion. At any rate, this is a distinction without a difference. Whether or not the defendant actually struck the other officers while attempting to escape had no bearing on the court's decision to apply the multiple victim exception.

Defendant further argues *Martin* is distinguishable because the two offenses involved different victims. According to defendant, the defendant in *Martin* "battered one officer, and resisted different officers." Not so. The defendant in *Martin* resisted all four officers, and such resistance led to the battery of one of them.

Finally, defendant argues the multiple victim exception is inapplicable here, because "there was only one count of attempted murder with one named victim, Roland [R.]" However,

in *Martin*, there was likewise only one count of battery of a peace officer with one victim.

In *People v. Masters* (1987) 195 Cal.App.3d 1124 (*Masters*), the defendant entered a negotiated plea of guilty to discharging a firearm at an occupied motor vehicle and assault with a deadly weapon following an incident in which he fired four or five shots at a vehicle containing several passengers and hit one of them. He was sentenced on both offenses. (*Id.* at pp. 1126-1127.)

On appeal, the defendant argued he could not receive separate punishment for both offenses because they were part of one indivisible course of conduct. The Court of Appeal disagreed, applying the multiple victim exception. The court explained: "In our view, Masters's violation of section 245, subdivision (a)(2), and section 246, while in the same course of conduct, resulted in the commission of violent crimes against different victims. Manifestly, Derrick Ross was the unfortunate victim of Masters's assault with a deadly weapon and all three occupants of the Mustang were victims of his discharge of the firearm at the vehicle. As Masters's violent actions were performed in a manner likely to cause harm to all three individuals in the vehicle, and in fact did seriously injure one person, the section 654 proscription against multiple punishment for violations arising from an indivisible course of conduct is inapplicable." (*Masters*, *supra*, 195 Cal.App.3d at p. 1128.)

In *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, the defendant was convicted of attempted murder and discharging a

firearm at an occupied motor vehicle following an incident in which he shot into a vehicle occupied by four people, striking one of them in the head. (*Id.* at p. 1733.) The Court of Appeal concluded the defendant properly received multiple punishments in light of the multiple victims. Relying on *Masters*, the court explained: "[T]he defendant's act was likely to cause harm to all four persons in the vehicle and in fact seriously injured one. Thus, the trial court properly imposed sentences under count I for attempted murder and under count II for shooting into an occupied vehicle." (*Gutierrez*, *supra*, at p. 1737.)

The purpose of section 654 is to assure a defendant's punishment is commensurate with his culpability. (*People v. Perez*, *supra*, 23 Cal.3d at pp. 550-551.) Defendant argues that "a defendant who fires shots but is only charged and convicted of one count of attempted murder is less culpable than a defendant who is convicted of multiple counts of attempted murder against different victims." However, the culpability of defendant's conduct is measured by the seriousness of that conduct, not the fortuity that he is charged with only one crime. In this case, defendant shot multiple times at a vehicle containing four passengers. The imposition of multiple punishments under these circumstances is warranted.

V

Section 4019

In *People v. Brown* (Mar. 16, 2010, C056510) ___ Cal.App.4th ___, we concluded recent amendments to section 4019 allowing for enhanced presentence custody credits apply retroactively to all

cases not yet final on January 25, 2010, the effective date of the amendments. However, because defendant was convicted of a serious felony as defined in sections 1192.7 and 2933.1 (see §§ 667.5, subd. (c)(12), 1192.7, subd. (c)(9), 2933.1, subd. (a)), he is not eligible for the enhanced credits. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.